

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

VICTOR MANUEL SOLIS, MARTA MILAGROS  
ORTIZ GALLIO, AND THE CONJUGAL  
PARTNERSHIP COMPOSED BY THEM,

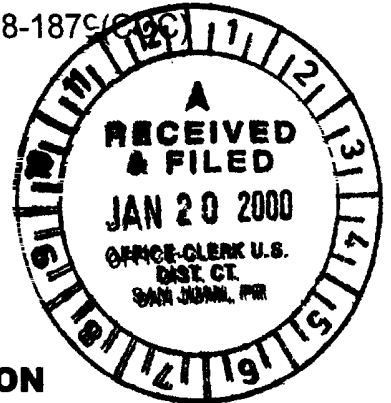
Plaintiffs

v.

PHILLIPS PUERTO RICO CORE, INC.,

Defendant

CIVIL NO. 98-1879-CC



**REPORT AND RECOMMENDATION**

Before this magistrate judge are Phillips Puerto Rico Core Inc.'s ("Phillips") Motion Requesting Partial Summary Judgment and Second Motion Requesting Partial Summary Judgment, filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiffs' opposition and defendant's sur-reply (D.E. #29, 30, 34, 36). These motions were referred by the court (D.E. #40) to be considered after the settlement conference was held (D.E. #42, 45). For the reasons stated below, I recommend that Phillips' motion for partial summary judgment be GRANTED.

I.

**INTRODUCTION**

The instant case was originally filed against Phillips by its former employee Víctor Manuel Solís ("Solís") before the Puerto Rico Court of First Instance, Guayama Superior Part, under the provisions of the Americans With Disabilities Act of 1990, 42 U.S.C. §

Pérez  
Velázquez  
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1 12101 ("ADA"), its Puerto Rico counterpart, Act 44 of 1985, P.R. Laws Ann. t. 1, § 501  
2 ("Act 44"), the Family and Medical Leave Act of 1993 ("FLMA"), 26 U.S.C. § 2601  
3 ("FMLA"), and Puerto Rico Act No. 80 of May 30, 1976, as amended, P.R. Laws Ann. t. 29  
4 § 185 ("Act 80"). The Complaint was removed to the U.S. District Court for the District of  
5 Puerto Rico, pursuant to 28 U.S.C. §1446(b).

6 On March 31, 1999, the ADA claim was dismissed with prejudice. Plaintiffs'  
7 Amended Complaint was filed on April 6, 1999 (D.E. #28) submitting four causes of action  
8 under above-stated federal and state-law provisions. Phillips' motions for partial summary  
9 judgment seek dismissal of the remaining claims.  
10

11 **II.**

12 **FINDINGS OF FACT<sup>1</sup>**

13 The uncontested facts of this case show the following:

14 1. Solís began working for Phillips' Guayama plant on September 5, 1967. He  
15 held various positions and on May 1, 1994, he was promoted to a supervisory position in  
16 the Processing Department, which he held until he ceased working for Phillips in October  
17 of 1996.

18 2. Phillips' Guayama plant operates in three rotating shifts during a 24-hour  
19 period. Solís had worked all three shifts.  
20

21 \_\_\_\_\_  
22 1. Phillips filed in this case a Statement of Uncontested Facts and a  
23 Second Statement of Uncontested Facts. Solís filed a Statement of  
24 Uncontested Facts in support of his opposition to Phillips' request for  
25 Summary Judgment. However, since Solís has not filed a Statement of Facts it  
26 contends are in dispute, as required by Rule 311.12 of the Local Rules of the  
U.S. District Court for the District of Puerto Rico ("Local Rules"),  
Phillips' Statement of Uncontested Facts must be deemed admitted.  
Furthermore, Phillips' Statements of Facts is supported by Solís' deposition  
testimony. See, Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548,  
2553 (1986).

1           3.     Solís admitted in his deposition that attendance is important in this type of  
2 operation and that it is part of every employee's performance.

3           4.     Nelson Ramírez ("Ramírez") was in charge of authorizing vacations,  
4 scheduling, appointing temporary employees, authorizing time off for employees in the  
5 Processing Department, among other duties. Ramírez was not in charge of the  
6 operational aspect of the Processing Department and he was not Solís' supervisor.

7                   **Solís' performance and absenteeism.**

8           5.     Before October 1996, Solís was involved in the following incidents: (a) He  
9 told Ramírez to "leave him alone" and complained that Ramírez was scheduling him for  
10 too many training sessions; (b) Ramírez counseled Solís for not following proper channels  
11 after he complained directly to the Phillips' President regarding the training schedule; (c)  
12 Solís had an encounter with Ramirez' acting secretary when he was asked to supply  
13 certain information requested by Ramírez which he said he had already furnished;  
14 (d) Solís was counseled by Mark Ingebretson ("Ingebretson") (Processing Department  
15 Manager) and held liable for the overflow of a tank under his custody that occurred when  
16 he transferred to another supervisor his responsibility for the tank; (e) Solís was  
17 reprimanded for removing two (2) independent contractor employees from a control room  
18 area; (f) Solís did not follow Ramírez' instructions that Solís document problems that were  
19 occurring with certain employees under his supervision; (g) in 1996, Solís argued with  
20 Ramírez over his decision not to replace an employee who was perceived to be a "poor  
21 performer."

22           6.     In addition, Solís had been reprimanded, before and after the beginning of  
23 his medical condition, for his pattern of absences and for requesting time off without  
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1 following company policy (Solís sought to charge absences to compensatory time instead  
2 of sick leave). Solís asked Ingebretson to instruct Ramírez to allow this procedure.

3 7. After the passing of Hurricane Hortense, Solís took three (3) unauthorized  
4 days off (for having worked an extended shift when his relief could not make it to work due  
5 to the storm), and he also took unauthorized time off after working overtime for three (3)  
6 consecutive nights (because his relief did not make it to work).

7  
8 8. Prior to October 1996, Ingebretson had asked Solís to improve his  
9 attendance.

10 **Solís' medical condition.**

11 9. In 1994, Dr. Melba Sotomayor, a neurologist, diagnosed Solís with a thyroid  
12 condition, and referred him to Dr. Alejandro, a thyroid specialist, and then to Dr. Julio  
13 Morales, who prescribed him rest.

14 10. Solís returned to work after he had rested.

15 11. Solís was absent with pay while receiving treatment and undergoing an  
16 operation by Dr. Morales.

17 12. Dr. Edna Griselle Meléndez, whom Solís began visiting around 1994, is  
18 currently treating his thyroid condition.

19 13. None of these doctors issued work restrictions to Solís besides rest.<sup>2</sup>

20 14. Phillips consistently granted Solís company-paid time off to attend medical  
21 appointments with his doctors.  
22

23 \_\_\_\_\_  
24 2. While Solís still worked at Phillips, Dr. Latalladi, a cardiologist,  
25 restricted him from working continuously or in an excited manner for more  
26 than ten minutes. Solís did not give Phillips the written restriction  
issued by his doctor, and did not inform Phillips of any work restrictions  
other than rest. Solís does not allege discrimination due to any heart  
condition.

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1           15. Solís claims that on four (4) occasions over a three-year period Phillips did  
2 not allow him to be absent.

3           16. Solís has testified that at least during one of these incidents, he was not  
4 allowed time off because there was no one available to cover for him.

5           17. During the last of these instances on October 21, 1996, Phillips requested  
6 Solís visit a psychologist, afforded him ten (10) paid days off, and advised that if he was  
7 not doing better he would be allowed additional days off. Solís never returned to work at  
8 Phillips.  
9

10           18. On October 23, 1996, Solís began receiving psychological therapy from by  
11 Dr. Ivonne Borrero, who was the first to diagnose his depression. He later was  
12 additionally treated by Dr. Luis A. Torrado.

13           19. Both have restricted him from returning to work and are currently treating his  
14 depression, which was diagnosed after he stopped reporting to work at Phillips.

15           20. Since October 21, 1996, his treating physicians have never authorized him  
16 to return to work.

17           21. Because Solís' depression continued, Phillips recommended that he apply  
18 for Short Term Disability ("STD") benefits and advised him that he would be reinstated if  
19 he was able to return to work within 26 weeks.  
20

21           22. During this time Solís returned on several occasions to meet with Lucy  
22 Merced, Phillips' benefits clerk, and to deal with matters related to the approval of his  
23 Long Term Disability ("LTD") application.

24           23. Solís completed and signed the documents to request STD and LTD. Both  
25 benefits were approved.  
26

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1           24. Solís was advised that LTD rules required him to apply for Social Security  
2 benefits in order to receive benefits in the amount of 50% of his salary.

3           25. On July 29, 1997, General American, Phillips' LTD insurance carrier, advised  
4 Solís that effective July 11, 1997, he would be granted certain monthly LTD benefits until  
5 he received a final decision on his application for Social Security benefits.

6           26. Solís complained that his LTD benefits should be greater since he was not  
7 yet receiving Social Security benefits.

8           27. After Lorenzo Gil and Arthur Austin (Phillips' Human Resources Directors)  
9 contacted General American, Solís was awarded an increased benefit. Solís began  
10 receiving Social Security disability benefits effective August 26, 1997.

11           28. On April 20, 1998, General American advised that Solís had been overpaid  
12 LTD benefits.

13           29. Solís admitted that it was General American that made the decisions  
14 regarding his LTD benefits, that all LTD related correspondence was sent by General  
15 American, and, that he has no dispute with Phillips in connection to his STD or LTD  
16 benefits.

17           30. Solís presently is covered by Phillips' medical insurance plan available to  
18 retired employees.

19           **Phillips' Policy.**

20           31. Phillips' policy prohibits the company doctor or nurse from disclosing an  
21 employees' medical information to any person at the company.

32. An ill employee must tender the medical certificate to dispensary personnel, who either authorizes the employee to work or informs the supervisor of the physician's work restrictions, without disclosing any additional information.

33. Solís admitted, and we find that, due to this policy, Ramírez did not know of his condition or what his medical appointments were for, since the infirmary nurses did not give Ramírez that information.

34. Pursuant to Phillips' Corporate Policy, all medical leaves, including FMLA run concurrently.

## II.

## SUMMARY JUDGMENT STANDARD

State law causes of action filed in federal courts are subject to the application of federal procedural rules. Consequently, Rule 56 of the Federal Rules of Civil Procedure and its interpretative case law govern the ruling on Phillips' requests for summary judgment, regarding all of Solís' claims.

A federal court may grant summary judgment in a civil action “if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). See Celotex; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986). Once a party seeking summary judgment has made this showing, the burden shifts to the nonmovant who must point to specific facts demonstrating that there is a trial worthy issue. See Celotex, 477 U.S. at 324.

1 To satisfy the criterion of trial worthiness, an issue must be "genuine." That is, the  
2 relevant evidence, viewed in the light most favorable to the party opposing the motion  
3 must be sufficient to allow the fact finder to solve issue in favor of either party. See  
4 Anderson v. Liberty Lobby, Inc.; Blanchard v. Peerless Ins. Co., 958 F.2d 483, (1<sup>st</sup> Cir.  
5 1992); Continental Casualty Co. v. Canadian Universal Ins. Co., 924 F.2d 370, 373 (1<sup>st</sup>  
6 Cir. 1991); Hahn v. Sargent, 523 F.2d 461, 464 (1<sup>st</sup> Cir. 1975), cert. denied, 425 U.S. 904  
7 (1976) (In summary judgment motions, the Court will not resolve questions of credibility or  
8 conflicting inferences but, will assess the sufficiency of evidence as a matter of law,  
9 resolving all factual disputes in favor of the opponent.)  
10

11 Trial worthiness needs "more than simply show[ing] that there is some  
12 metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio  
13 Corp., 475 U.S. at 586. The evidence illustrating the factual controversy cannot be  
14 conjectural or problematic; it must have substance in the sense that it limns differing  
15 versions of the truth which a fact finder must resolve ...." Mack v. Great Atl. & Pac. Tea  
16 Co., 871 F.2d 179, 181 (1<sup>st</sup> Cor. 1989). If the evidence is based on conjecture, or is not  
17 significantly probative of the fact alleged in the complaint, there is no genuine issue, and  
18 the Court may grant summary judgment. Anderson v. Liberty Lobby, Inc.; First National  
19 Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968); Local No. 48, United  
20 Broth. of Carpenters & Joiners v. United Broth. of Carpenters & Joiners, 920 F.2d 1047,  
21 1050 (1<sup>st</sup> Cir. 1990).  
22

23 Trial worthiness further requires that the dispute involves a "material" fact. See  
24 Anderson v. Liberty Lobby, Inc. This means that a fact has the capacity to affect the  
25 outcome of the litigation under the applicable law. See *id.*; see also United States v. One  
26

1 Parcel of Real Property, Etc. (Great Harbor Neck, New Shoreham, R.I.), 960 F.2d 200,  
2 204 (1<sup>st</sup> Cir. 1992). "If the facts on which the nonmovant relies are not material, or if its  
3 evidence "is not significantly probative," *brevis* disposition becomes appropriate." Nat'l  
4 Amusements, Inc. v. Town of Dedham, 43 F.3d 731 (1<sup>st</sup> Cir. 1995).

### III.

#### SOLÍS' DISCRIMINATION CLAIM

8 The parties disagree whether the appropriate standard to assess disability  
9 discrimination under Act 44 is that of the ADA or of Puerto Rico Act 100 of June 30, 1959,  
10 P.R. Laws Ann. t. 29 § 146 et seq. ("Act 100"). Act 44 was amended in 1991 to  
11 harmonize it with the ADA. P.R. Laws Ann. t. 1, § 507(a).<sup>3</sup> The legal analysis followed  
12 under the ADA has been applied by Puerto Rico courts to claims under Act 44. Rivera  
13 Flores v. Compañía ABC H/N/C McGraw of P.R. Inc., 138 D.P.R. \_\_\_\_ (1995), 95 C.D.T.  
14 25. See Ríos v. Cidra Manufacturing Operations of P.R., 98 TSPR 74, 98 WL 422495  
15 (P.R. 1998). Consequently, Solís' Act 44 claim should be evaluated according to ADA  
16 standards. Furthermore, Act 44 was molded after the ADA, and since it is lacking  
17 regulatory guidelines or interpreting case law, it is reasonable to conclude that ADA  
18 standards should guide the determination of whether a plaintiff is entitled to relief under  
19 Act 44.  
20

#### **A. Analysis under ADA standards.**

22 Since Solís has shown no direct evidence of discrimination, his claim is subject to  
23 the burden shifting scheme established for Title VII cases in McDonnell Douglas Corp. v.  
24

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26 3. Statement of Motives of Act No. 105 of December 20, 1991.

1 Green, 411 U.S. 792, 801, 93 S.Ct. 1817, 1824 (1973); 42 U.S.C.A. § 12112. See also  
2 Jacques v. Clean-Up Group, Inc., 96 F.3d 506 (1<sup>st</sup> Cir. 1996).

3 Accordingly, Solís bears the burden of establishing: (a) that he is disabled within  
4 the meaning of the ADA; (b) that he is qualified to perform the essential duties of the job,  
5 with or without reasonable accommodation, and is able to perform the essential functions  
6 of his job; and, (c) that Phillips discharged him or failed to accommodate him due to his  
7 disability. Jacques 963 F.3d at 511; McNemar v. Disney Store, Inc., 91 F.3d 610 (3<sup>rd</sup> Cir.  
8 1996).

9  
10 If Solís is able to meet this burden, Phillips must then set forth a legitimate,  
11 nondiscriminatory reason for the adverse action taken.

12 **1. Whether Solís' illness raises to the level of a disability.**

13 Not all physical impairments rise to the level of an ADA covered disability. Katz v.  
14 City Metal Co., Inc., 87 F.3d 26 (1<sup>st</sup> Cir. 1996). To make an ADA claim Solís must prove  
15 that he is a disabled individual. From the uncontested facts it appears during Solís'  
16 employment at Phillips, his thyroid condition (a physical impairment) did not rise to the  
17 level of disability, substantially limiting his major life activity of working. 29 C.F.R. 1630.2  
18 (i),(j)(2).<sup>4</sup> During that time period he was undergoing nothing more than routine medical  
19 examinations and his condition did not prevent him from performing his duties. However,  
20 seeing the facts in the light most favorable to Solís, we will assume for purposes of this  
21 report and recommendation that he was disabled.  
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4. At the time Solís was working at Phillips, he had not yet been diagnosed with his emotional condition.

1

2       **2. Whether Solís is a qualified individual.**

3       Disability discrimination is only prohibited when the affected employee is able to  
4 perform the essential duties of his job including the skill, experience, education,  
5 attendance, and other job-related requirements of the position he holds or desires, with or  
6 without reasonable accommodation. 29 C.F.R. § 1630.2. See also, Southeastern  
7 Community College v. Davis, 442 U.S. 397, 99 S. Ct. 2361 (1979).  
8

9       The employee must prove that: (a) he can perform the essential functions of the job  
10 (functions bearing more than marginal relationship to the job); or (b) that a reasonable  
11 accommodation will enable him to perform those essential functions. Milton v. Scrivner,  
12 Inc., 53 F.3d 1118, 1123 (10<sup>th</sup> Cir. 1995); Jacques 96 F.3d at 511. Otherwise, an  
13 employee is not protected by the ADA (and Act 44). 42 U.S.C. § 12118; Beauford v.  
14 Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S.  
15 938, 108 S. Ct. 1116 (1988).  
16

17       Solís was not "otherwise qualified" to perform the essential functions of his job  
18 since: (a) his physicians have issued restrictions prohibiting him from working; (b) he has  
19 not been authorized by his physicians to return to work, with or without any  
20 accommodations, reasonable or otherwise; (c) he was declared disabled and is receiving  
21 benefits from the Social Security Administration, which prohibits him from working while  
22  
23  
24  
25  
26

1 receiving such benefits;<sup>5</sup> and (d) his absences impeded him from satisfactorily performing  
2 the essential duties of his job.<sup>6</sup>

3 Therefore, it is clear that Solís is not qualified to perform the essential functions of  
4 his job. Consequently, Solís' disability claim should be dismissed. 42 U.S.C.A.  
5 sec.12112. Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1<sup>st</sup> Cir. 1997).

6 **3. Whether Solís was reasonably accommodated.**

7  
8 The uncontested facts show that Solís never requested Phillips provide him any  
9 reasonable accommodations, and that his doctors never issued work restrictions, besides  
10 rest, prior to October 21, 1996. Therefore, the only "accommodation" Phillips could offer  
11 was to allow Solís to rest when he requested it. The record shows that Phillips  
12 consistently reasonably allowed Solís to rest with pay when required by his doctors.

13 Phillips also allowed Solís to attend most of his medical treatment appointments  
14 and granted him, sick leave, compensatory time, vacation leave, STD and LTD benefits,  
15 among others.

16 **B. Analysis under Act 100 Standard.**

17  
18 Even if Solís' claim was evaluated under Act 100 standards, he is still not entitled to  
19 a remedy. Act 100 creates a presumption of discrimination when a person is unjustly  
20 discharged, as defined by Act 80. The employer must then show by a preponderance of  
21 the evidence that the dismissal was not discriminatorily motivated.

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22 5. Although his receiving Social Security Benefits does not automatically  
23 disqualify him from making a discrimination claim, this fact along with  
24 others such as the restrictions not to work issued by his physicians, and the  
progressive nature of his condition, render him unqualified to work, with or  
without accommodations, and precludes him from relief under ADA standards.

25 6. Even if the reasonable accommodation required by Solís was to allow him  
26 to be constantly absent, his claim fails because, as admitted during his  
deposition, attendance is an essential element of his work at Phillips.

1 Under this scheme the Court must first evaluate if Solís' discharge was unjustified  
2 under Act 80. Since Solís was not actually discharged, he has to show that a constructive  
3 discharge took place. See Vélez de Reilova v. Palmer Bros., Inc., 94 D.P.R. 175 (1967).  
4 If Solís was not constructively discharged, then the Court's inquiry should end, since the  
5 presumption that arises under Act 100 is that no discrimination took place. See Ibáñez v.  
6 Molinos de P.R., 114 D.P.R. 42 (1983). If Solís was unjustly discharged, Phillips may  
7 rebut the presumption of discrimination by showing by a preponderance of the evidence  
8 that the dismissal was not discriminatorily motivated. Id.

9  
10 **1. Solís' constructive discharge allegation.**

11 A constructive discharge under Act 80 takes place when an employer induces an  
12 employee to resign. Vélez de Reilova v. Palmer Bros., Inc. Act 80 cites as examples  
13 thereof when an employer imposes more onerous working conditions on the employee,  
14 reduces his salary, lowers his job category or submits him to derogatory criticisms. P.R.  
15 Laws Ann. t. 29, § 185e.

16 Besides the above, federal courts evaluating constructive discharges, have  
17 considered factors such as changes in cubicle location, work title and duties, requirement  
18 to work during vacations and harsh confrontations with a supervisor. Ramos v. Davis &  
19 Geck, Inc., 167 F.3d 727 (1<sup>st</sup> Cir. 1999).

20  
21 Constructive discharge has required evidence that the new working conditions were  
22 so difficult or unpleasant that a reasonable person would have felt compelled to resign  
23 and warns that employees may not be unreasonably sensitive to their working  
24 environment. Greenberg v. Union Camp Co., 48 F.3d 22, 27 (1<sup>st</sup> Cir. 1995). See also  
25 Darnell v. Target Stores, 16 F.3d 174 (7<sup>th</sup> Cir. 1994), which requires a showing that the  
26

1 employer's actions were part of a "plan" to force him to resign. Otherwise, a claim of  
2 constructive discharge must be dismissed as a matter of law. Stetson v. Nynex Service  
3 Co., 995 F.2d 355, 360-361 (2<sup>d</sup> Cir. 1993) (A constructive discharge does not occur when  
4 an employee was dissatisfied with the nature of his assignments, when the employee  
5 feels that the quality of his work has been unfairly criticized, nor when the employee's  
6 working conditions were difficult or unpleasant.)

7  
8 The uncontested facts in this case show that Solís was not constructively  
9 discharged under any of the aforestated factors. His position, duties or job category were  
10 not altered, his salary was not reduced, no adverse employment action was taken against  
11 him, and his working conditions were not made intolerable. He was never induced to  
12 resign by Phillips.

13 Solís has claimed that he was denied four days off during a three-year period to  
14 attend medical appointments of less than a full day duration (as opposed to dozens of  
15 instances where permission was granted), that on four occasions he had to work 16-hour  
16 or 18-hour shifts (which can be expected in a 24-hour operation) and that Ramírez, who  
17 was not his supervisor, once said he should have been fired. These isolated incidents  
18 within a three-year span do not create an intolerable work atmosphere.

19  
20 This Court cannot conclude that a reasonable person in Solís' position would feel  
21 that his working conditions were intolerable and that he had no choice but to resign.

## 22 **2. Discharges by Operation of law.**

23 The Puerto Rico Supreme Court has construed Act 80 to allow for termination of  
24 employment in similar situations where the discharge is by operation of law. Courts have  
25 found that just cause for dismissal under Act 80 exists when an employee is "discharged"

26

1 from his employment because he has not been released from medical treatment at the  
2 time the employer's duty to reserve employment has expired. Segarra v. Royal Bank de  
3 Puerto Rico, 98 TSPR 36 (1998), 99 WL 294502 (1999); Torres González v. Starkist  
4 Caribe, Inc., 136 D.P.R. \_\_ (1994).

5       Classifying Solís as an inactive employee is a consequence of his condition and of  
6 the provisions of the LTD plan (which Solís was informed of) and the Social Security  
7 Administration requirements. Thus, Solís' status was not a product of Phillips' whim, as  
8 prohibited by Act 80. Since Solís was not constructively discharged, it is presumed that his  
9 dismissal was not discriminatory.  
10

11       **3. Even if Solís was constructively discharged from his employment,**  
12       **Phillips has rebutted the presumption of discrimination.**

13       Even if Solís had established a prima facie case, any inference of discrimination  
14 that could have arisen there from vanishes upon Phillips' explanation of the actions taken.  
15 St. Mary's Honor Center v. Hicks, 509 U.S. 502 , 113 S.Ct. 2742 (1993); Pages-Cahue v.  
16 Iberia, 82 F.3d 533, 536 (1<sup>st</sup> Cir. 1996).

17       It is clear that the termination of Solís' employment does not amount to any  
18 adverse action by Phillips, since his status as an inactive employee was the consequence  
19 of the operation of various statutes, policies, and the restrictions of Solís' physicians.  
20 Because of Solís' medical condition and his own doctors' restrictions, he cannot meet a  
21 basic requirement of his job, attending work.

22       The only evidence Solís claims shows discriminatory motive by Phillips is: (1) that  
23 on four occasions between 1994 and 1996 he was denied days off to attend medical  
24 appointments; (2) that in 1995 he worked 16-hour shifts when the supervisor that was  
25 going to relieve him did not show up; (3) that in September of 1996, after the passage of  
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1 Hurricane Hortense, he worked during eighteen consecutive hours because the supervisor  
2 that would relieve him got caught in the storm; and (4) that Ramírez supposedly once said  
3 that he should have been fired.

4 Of these incidents the only ones related to Solís' medical condition are the four  
5 denials to attend medical appointments.<sup>7</sup> Solís recognized that at least one of these times  
6 his request was denied because no one could cover him. This is not enough to show that  
7 Phillips had discriminatory intent towards Solís because of his condition, specially when  
8 the undisputed facts show that Solís was consistently granted dozens of requests to  
9 attend medical appointments.  
10

11 No discriminatory intent can be drawn from Solís working extended shifts since it  
12 was because of circumstances beyond Phillips' control (the passage of a hurricane, the  
13 absence of the supervisor that was scheduled to relieve Solís from his work.) These  
14 events do not establish discriminatory intent on the part of Phillips.

15 Conversely, the uncontested facts show that Phillips attended to Solís' medical  
16 condition. Upon realizing Solís' needed medical assistance, Phillips sent him to see a  
17 doctor, and later recommended that Solís enroll in STD. Rather than showing  
18 discriminatory intent, this only proves that Phillips was following its procedures and  
19 complying the recommendations of Solís' physicians that he should rest and not report to  
20 work.  
21

22 Finally, since no one besides the authorized medical personnel at Phillips' infirmary  
23 knew of Solís' condition prior to October 21, 1996, he cannot show that any action by  
24

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25 7. Solís stated in paragraphs 18 and 19 of Solís' Statements of  
26 Uncontested Facts that his appointment was "to see how the burning was  
doing", that "what should have been a routine checkup . . . turned out to be  
an absence from work of over a month."



1 **A. Solis did not suffer from a serious health condition and could perform the**  
2 **duties of his job at the time he was employed at Phillips.**

3 “Serious health condition” is an illness, injury, impairment, or physical or mental  
4 condition that involves: (a) inpatient care in a hospital, hospice, or residential medical  
5 care facility; or (b) continuing treatment by a health care provider. 29 U.S.C. § 2611(11).  
6 Employees whose condition does not cause them to be absent from their position for  
7 more than three calendar days do not suffer from a serious health condition. Bauer v.  
8 Varity Daton-Walther Corp. 118 F. 3d 1109 (6<sup>th</sup> Cir 1997); Seidle v. Provident Mut. Life  
9 Ins. Co. 871 F. Supp. 238 (E.D. Pa. 1994). An employee must provide the employer at  
10 least sufficient information to put the employer on notice that an FMLA qualifying leave is  
11 needed. Stoops v. One Call Communications, Inc., 141 F.3d 309 (7<sup>th</sup> Cir. 1998).  
12

13 If an employee qualifies for FMLA leave to care for the employee’s own serious  
14 health condition, the employer may require the employee to use the FMLA leave  
15 concurrently with his or her accrued paid leaves. (i.e. vacation leave, personal leave, or  
16 medical or sick leave) 29 U.S.C. § 2612(d)(2)(B). If the employee’s accrued paid benefits  
17 exceed 12 weeks, he or she will not be able to enjoy FMLA benefits consecutively.  
18 29 C.F.R. § 825.207(a).

19 Solís was not entitled to FMLA benefits in 1994 when he was absent for thirteen  
20 days because of his thyroid condition, since at that time he was granted paid leave which  
21 is the greater benefit. Thereafter, he continued on medical visits on a monthly basis, but  
22 those monthly visits were for medical check ups that did not exceed a period of three  
23 days, thus not qualifying for FMLA benefits. Solís was thereafter absent for a month, but  
24 again, he was granted paid leave, which is a greater benefit.  
25  
26

1 None of the requests made was for a period in excess of three days. Employer  
2 leave policies (sick leave) were meant to cover absences of less than three days as is  
3 noted in the legislative history of the FMLA. Stoops; Bauer; Brannon v. Oshkosh B'Gosh,  
4 Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995). Solís was only attending follow-up  
5 appointments, which are not the type of leave contemplated by the FMLA. After these  
6 appointments, Solís would return to work as usual. Solís never presented a medical  
7 certificate requiring him to be off work on the four occasions at issue, and never gave  
8 Phillips any information suggesting that he could not work which would have caused  
9 Phillips to request that he provide a medical certificate.  
10

11 Solís was allowed paid time off when he was initially operated on. Once recovered,  
12 Solís was fully released to return to work, which he did, and was not incapacitated further  
13 nor unable to perform his job at any time pertinent to his requests for time off to see his  
14 physician. In fact, Solís worked for nearly two years, from 1994 to 1996 with his thyroid  
15 condition, which demonstrated to Phillips that even if he had some type of illness, it was  
16 not a "serious illness" sufficient to deter him from performing his job functions.  
17

18 Consequently, Solís did not qualify for FMLA benefits as to any of the events he  
19 cites either because his absences were not for an excess of three days or because he  
20 was granted a greater benefit: paid medical leave. Since leaves at Phillips run  
21 concurrently, Solís cannot claim them at the same time. By accepting paid leave, he  
22 cannot receive unpaid leave under the FMLA.

23 Solís was not "incapacitated" on those occasions when he alleges that was denied  
24 an opportunity to visit his physician. Hodgens v. General Dynamics Corp., 963 F. Supp.  
25 102, 106 (D.R.I. 1997). It was not until October 1996, that Solís' physician restricted him  
26

1 from working. Solís is simply not entitled to FMLA benefits because he was never unable  
2 to perform his job functions at the time he was allegedly denied time off to attend certain  
3 medical appointments.

4 **1. Solís was given notice of his rights.**

5 Although the FMLA requires employers to give notice of the rights afforded by it,  
6 such duty arises at the moment when it can be anticipated by the employer that the  
7 employee is in need of taking advantage of the leave. Since Solís' need for the leave  
8 could not have been anticipated, (his need was not evident as, for example, a pregnancy  
9 or physical accident would have been) and was never requested, then the duty to give  
10 notice did not arise.  
11

12 Solís claims that he did not know of the existence of FMLA benefits while he  
13 worked at Phillips. However, the uncontested facts and the evidence on record show that  
14 Phillips placed a posting of FMLA benefits on its bulletin board and gave Solís written  
15 copy of Phillips' FMLA policy.<sup>8</sup> Phillips has in place an Unavoidable Absence Benefit Plan  
16 which awards employees several leaves, including FMLA benefits. All employees are  
17 made aware of these benefits by providing them copy of the plan and by posting a copy of  
18 Phillips' policy on bulletin boards on Company premises. Employees have easy access to  
19 the areas where these postings are located. Phillips has, therefore, made its employees  
20 aware of their right to FMLA benefits.  
21

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22  
23 8. This Court finds that Arthur Austin, as the person in charge of  
24 Phillips' Human Resources Department and custodian of the department's files,  
25 has access to employee records and other records contained in the Human  
26 Resources Department. Austin can attest to information he gathers from  
company files. From these files, Austin knows from which date the benefits  
were granted to Solís, when and where the FMLA postings were made and whether  
Solís was given notice of his benefits.

1 Furthermore, Solís never gave notice of his need for FMLA leave. In fact, many  
2 employees were afforded FMLA benefits while Solís was still an active employee at  
3 Phillips.

4 As previously discussed, the FMLA requires that an employee give the employer  
5 sufficient information to put it on notice that the employee suffers from a condition that  
6 may qualify him or her to receive FMLA benefits. Only when this is done, does the  
7 employer's duty to provide benefits arise.

8 Solís never gave Phillips any information that he needed FMLA benefits. Solís'  
9 deposition testimony was clear that until his last day at work no one at Phillips knew of his  
10 condition, but the Company nurses, who by Company policy were precluded from  
11 divulging that information. Solís specifically admitted that Ramírez, who made the  
12 decision denying the four requests for time off, did not know of his health condition. It was  
13 not until Solís' last day of work at Phillips that Ramírez became aware that he had a  
14 serious medical condition. Since Solís never gave notice of his condition, he cannot claim  
15 that Phillips failed to advise him as to these benefits.

16 Ramírez could not have advised Solís since he did not know all the details about  
17 his condition. Both Solís and Phillips' Statement of Facts point to the fact that when Solís  
18 broke down during his last day of work at Phillips, Ramírez spontaneously stated that he  
19 did not know that Solís was sick.

20 Because of the above, it is clear that Phillips was not put on notice that he suffered  
21 from a condition that qualified for FMLA benefits.

22 As such, the motion for Partial Summary Judgment filed by Phillips should BE  
23 GRANTED.

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**IT IS SO RECOMMENDED.**

The parties have ten (10) days to file any objections to this report and recommendation. Failure to file same within the specified time waives the right to appeal this order. Henley Drilling Co. v. McGee, 36 F.3d 143, 150-151 (1st Cir. 1994); United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

San Juan, Puerto Rico, January 13, 2000.



J. ANTONIO CASTELLANOS  
UNITED STATES MAGISTRATE JUDGE